STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID T. CRESAP,

Defendant-Appellant.

UNPUBLISHED
March 20, 2003

No. 231406
Oakland Circuit Court
LC No. 99-168453-FC

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was found guilty but mentally ill of two counts of first-degree premeditated murder, MCL 750.316, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment without parole for each of the murder convictions to be served consecutively to concurrent two-year terms for the felony firearm convictions. He appeals by right. We affirm.

Defendant raises several challenges to the trial court's findings of fact. A trial court's findings of fact in a bench trial are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); MCR 2.613(C). A finding is clearly erroneous where, after reviewing the entire record, this Court is "left with a definite and firm conviction that a mistake has been made." *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

We reject defendant's argument that the court's findings are deficient because the court's opinion does not set forth "subsidiary facts." Defendant cites *People v Jackson*, 63 Mich App 249, 253; 234 NW2d 471 (1975), in support of his claim that the court's findings were deficient. However, in *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990), this Court resolved a conflict concerning the requisite degree of specificity for a court's findings at a bench trial. This Court determined that MCR 2.517 is satisfied where it appears from the court's findings that the court was aware of the factual issues and correctly applied the law. *Id.*; *People v Wardlaw*, 190 Mich App 318, 320-321; 475 NW2d 387 (1991). This standard does not require that a court state subsidiary facts or reasons for its conclusions, as defendant argued. Therefore, the court's failure to include "subsidiary facts" was not error.

Defendant argues that the court's opinion fails to indicate that it was his burden to prove insanity by a preponderance of the evidence. In its opinion, the court stated, "The Court finds beyond a reasonable doubt that the Defendant was not legally insane at the time of the

commission of the offense." Given that the court was convinced beyond a reasonable doubt that defendant was not insane, the court necessarily was not persuaded that a preponderance of the evidence showed that defendant was insane. In light of this finding, any misunderstanding on the court's part inured to defendant's benefit and, therefore, does not warrant appellate relief.

Contrary to defendant's contention, the court did not clearly err in finding that Dr. Abramsky conceded that his opinion would be different had he known that defendant admitted to others that he was lying to the police on September 25, 1995. The finding is supported by Dr. Abramsky's affirmative answer to the prosecution's question, "If the Defendant did know that it was a false statement when he told the police someone else shot his parents, would that possibly change your opinion?" The court did not state that Dr. Abramsky conceded that defendant admitted lying to the police, only that if Dr. Abramsky knew that information, his opinion would have changed. The hypothetical question appears to have been based on Dr. Clark's testimony that defendant admitted to him that when he told the police and others that someone else had killed his parents, he did not believe that was what happened, but said so to avoid incriminating himself. Hence, the trial court's finding is not clearly erroneous.

Defendant also argues that the trial court misstated Dr. Balay's testimony when stating, "Dr. Balay opines that Defendant was not insane because his appreciation of wrongfulness after the event."

Defendant is correct that Dr. Balay did not opine that defendant was not insane. In her testimony and report, Dr. Balay consistently maintained her opinion that defendant was insane, i.e., not criminally responsible. The court's opinion appears to be internally inconsistent with regard to Dr. Balay's opinion on this subject. Initially, the court correctly recognized that "Dr. Balay said he was not criminally responsible." Later, however, the court stated, "Dr. Balay opines that Defendant was not insane because his appreciation of wrongfulness after the event." The two statements appear to be inconsistent because, as Dr. Balay explained, she used the term "not criminally responsible" to mean that the legal definition of insanity was met. Ordinarily, where a trial court's findings are inconsistent or ambiguous, remand for clarification is appropriate. In this case, however, we are not convinced that remand for further explanation is necessary to facilitate appellate review. *People v Shields*, 200 Mich App 554, 559; 504 NW2d 711 (1993). When the contested finding is read in context, the court's intended meaning is apparent. The statement addresses the portion of Dr. Balay's testimony on cross-examination in which she was asked to specify weaknesses in her conclusion that defendant was insane. In light of the court's recognition at the outset that Dr. Balay opined that defendant was insane, we are not persuaded that the challenged finding, although poorly drafted, requires a remand for further explanation.

Defendant's next issue is a challenge to the sufficiency of the evidence of premeditation and deliberation. However, defendant's argument focuses on the corpus delicti rule, which he claims was violated because his statements to the doctors were admitted without the prosecution first proving premeditation and deliberation by other evidence. Defendant did not preserve this issue by moving to suppress his statements on this basis at trial. *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988); *People v Harris*, 113 Mich App 333, 335-336; 317 NW2d 615 (1982). Moreover, the argument is without merit because the corpus delicti of first-degree murder requires only proof of "a death and some criminal agency that caused the death." *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996); see, also, *People v Williams*, 422 Mich

381, 388; 373 NW2d 567 (1985). Defendant does not argue that those elements were not established.

To the extent that defendant is challenging the sufficiency of the evidence of premeditation and deliberation apart from the corpus delicti rule, we are not persuaded that the evidence was insufficient. The evidence indicated that defendant purchased a gun four days before the killings, that he decided to kill his parents, obtained the gun, entered his parents' bedroom, and began shooting. Additionally, while they were still alive, he left the room to get an axe that was kept in the basement. He returned to the bedroom and inflicted several axe blows to the victims, who attempted to defend themselves. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find premeditation and deliberation beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant also argues that the trial court's finding of premeditation and deliberation was against the great weight of the evidence. Although defendant did not raise this issue in a motion for a new trial in the trial court, consistent with MCR 7.211(C)(1)(c), we will treat the issue as preserved. A new trial based upon the great weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

Specifically, defendant argues that his mental illness made him incapable of premeditating and deliberating the killings. Defendant essentially asserts that he had a "diminished capacity" that precluded him from forming the requisite intent.[1]

In *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001), our Supreme Court held that "diminished capacity" is not a viable defense in Michigan. The Court noted that it had never specifically authorized the use of the defense, which had been introduced to Michigan and developed by this Court. *Id*. at 233-235. The Court determined that the Legislature, by enacting the statutory framework for the insanity defense, "demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Id*. at 237.

Defendant's argument that the court's finding of premeditation and deliberation is against the great weight of the evidence because his mental illness made him incapable of premeditating and deliberating is incompatible with *Carpenter*'s holding that diminished capacity is not a viable defense in Michigan. Pursuant to *Carpenter*, evidence of defendant's mental illness, which the court found did not meet the threshold for insanity, could not be "used to avoid or reduce criminal responsibility by negating specific intent." *Id*. at 237. Although defendant asserts that *Carpenter* cannot be applied retroactively, he does not further discuss or attempt to explain his position regarding this issue. Accordingly, we deem that point abandoned as being inadequately briefed. "A party may not merely state a position and then leave it to this Court to

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[1] The case cited by defendant, *People v Lynch*, 47 Mich App 8; 208 NW2d 656 (1973), is cited by the Supreme Court in *People v Carpenter*, 464 Mich 223, 233; 627 NW2d 276 (2001), as the case that introduced the diminished capacity defense to Michigan.

discover and rationalize the basis for the claim." *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999).

Defendant also claims that consideration of the factors set forth in *People v Conklin*, 118 Mich App 90; 324 NW2d 537 (1982), do not support a finding of premeditation and deliberation. We disagree. The circumstances of the killing support the trial court's finding of a premeditated and deliberate murder. The facts and circumstances reveal that defendant had numerous opportunities to reflect on his actions before he killed the victims. The evidence indicated that defendant fired a rifle repeatedly and that each shot required him to manually eject the spent cartridge. See *People v Strunk*, 184 Mich App 310, 325-326; 457 NW2d 149 (1990) (discussing the use of a pump-action shotgun in the context of a defendant's challenge to the sufficiency of the evidence of premeditation and deliberation.) Furthermore, when the shooting did not kill the victims, defendant retrieved an axe and chopped at them. Patently, defendant had the opportunity to reflect on his actions. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). The forensic evidence, including the presence of victim's defensive wounds, proved that the victims were alive when defendant began attacking them with the axe. Defensive wounds may be evidence of premeditation. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). Because the evidence does not preponderate heavily against the verdict, defendant is not entitled to relief on this basis.

Defendant next argues that the trial court's determination that he was criminally responsible is against the great weight of the evidence. We disagree.

Insanity is an affirmative defense requiring proof that as a result of mental illness or mental retardation, the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or to conform his conduct to the requirements of the law. MCL 768.21a(1); see, also, *Carpenter, supra* at 230-231. The defendant bears the burden of proving the defense of insanity by a preponderance of the evidence. MCL 768.21a(3); *Carpenter, supra* at 231.

Two of the three psychiatric experts, Drs. Balay and Abramsky, believed that defendant was insane. The other, Dr. Clark, believed that defendant was mentally ill but not insane at the time of the offenses. Both Dr. Balay and Dr. Abramsky expressed some uncertainty about their conclusions.

Dr. Abramsky recognized that the case was in "a gray area" because of defendant's illness. Dr. Abramsky believed that although defendant could not articulate it, he might have operated under a delusion. Dr. Abramsky concluded that when defendant was interviewed by the police, he did not know whether or not he had committed the crime. As previously mentioned, Dr. Abramsky conceded that his opinion might change if there were evidence that defendant knew he was lying when he talked to the police. Dr. Clark's testimony later provided that evidence.

Dr. Balay indicated that the assessment of defendant's ability to appreciate the wrongfulness of his conduct was "very tricky" because his behavior afterward demonstrated that he knew he had done something wrong. She inferred that at the time of the crime, he did not know that what he was doing was wrong, but she recognized that this was a "questionable position." She inferred that at that time of the killings, defendant was in a state of rage, but

recognized that the inference was not "clear cut." She found no evidence that he was able to conform his conduct and "limited evidence" that he was unable to conform his conduct to the requirements of the law.

In contrast with Dr. Balay and Dr. Abramsky, Dr. Clark opined that the case was not that close, but was "rather more clear." He found inadequate evidence of a link between defendant's mental illness and the killings. He believed that defendant's explanation that he used the axe to put his parents out of their suffering showed that he was capable of appreciating wrongfulness during the killings. Unlike the other experts, Dr. Clark believed that defendant was in full control and engaged in conscious and goal-directed behavior as he shot at his parents, retrieved a second weapon, and then attempted to conceal his actions.

The trial court found Dr. Clark's report thorough and convincing. Having reviewed the evidence, we do not believe that it heavily preponderates against the court's determination that defendant was criminally responsible.

Defendant next asserts that the absence of the court's own analysis for reaching its verdict "leads to the inference this may have been a compromised [sic] verdict." Defendant does not explain the factual or legal basis for this claim. His cursory argument merely repeats the assertion that the court's findings inadequately explain the reasons for the verdict. Because defendant does not explain the basis of this claim, we deem it abandoned. *Griffin, supra* at 45.

Defendant next argues that his answers to background questions posed by the police before he was given *Miranda*[2] warnings on September 25, 1995, were inadmissible. In addition, defendant claims that all of his answers on September 26, 1995, were inadmissible because the *Miranda* warnings were not repeated. Defendant argues that his answers during these interviews were used against him in a "forensic context." Because defendant did not raise these specific challenges to the admissibility of the statements below, we review this unpreserved issue for plain error in accordance with *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999).

Defendant has not established plain error with respect to the background questions. Routine booking questions are not "interrogation." See *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995).

Although defendant claims that fresh warnings were required when his interview resumed on September 26, 1999, the cases he cites in support of that position are readily distinguishable from the case at bar. *People v Catey*, 135 Mich App 714; 356 NW2d 241 (1984), and *Michigan v Mosley*, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975), address the circumstances in which questioning may be resumed after a suspect invokes the right to remain silent. Defendant does not assert that he invoked that right in this case.

To the extent that defendant is arguing that the warnings became stale with the passage of time, we note that "[t]he police are not required to read *Miranda* rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992). This Court

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

has stated that "the failure to reread a defendant's *Miranda* rights prior to each interrogation does not render his subsequent statements inadmissible as evidence against him. Rather, a factual question is raised as to whether the statements were voluntary." *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986). Here, however, defendant does not argue on appeal that the statements were involuntary. Accordingly, defendant has not established plain error.

We affirm.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra